

JUL 14 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

CC Docket No. 92-297

Suite 12 Group Petition for Pioneer Preference

PP-22

**REPLY OF THE RURAL TELECOMMUNICATIONS GROUP
TO CONSOLIDATED OPPOSITION OF CELLULARVISION USA, INC.**

The Rural Telecommunications Group ("RTG"),¹ by its attorneys, and pursuant to Section 1.429(g) of the rules of the Federal Communications Commission ("FCC" or "Commission"), hereby replies to the "Consolidated Opposition of CellularVision USA, Inc. to Petitions for Reconsideration" ("Opposition") filed July 2, 1997, by CellularVision USA Inc. ("CVUS") in the above referenced proceeding.²

¹ RTG is a group of over sixty concerned rural telecommunications companies who have joined together to promote the efforts of member rural telecommunications companies to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members desire to provide LMDS to customers within their existing service areas as well as in adjacent areas.

² On May 29, 1997, RTG filed a Petition for Reconsideration (“RTG Petition”) of the *Second Report and Order and Order on Reconsideration* (“*Second R&O*”) released by the Commission on March 13, 1997, in CC Docket No. 92-297.

100

CVUS argues that the Commission need not impose strict buildout requirements on Local Multipoint Distribution Service (“LMDS”) licensees in order to “ensure the prompt delivery of service to rural areas,” as Section 309(j) of the Communications Act of 1934, as amended (“the Act”) requires.³ CVUS instead posits the use of geographic partitioning as an alternative to the imposition of strict buildout requirements. CVUS argues that if the Commission allows geographic partitioning of LMDS licenses, the “flexibility” of the Commission’s proposed partitioning rules will “likely” create “incentives” to “maximize coverage to rural consumers.”⁴ Unfortunately, CVUS’s reliance on the Commission’s partitioning proposal to result in the provision of service to rural areas is misplaced.

First, partitioning by itself, fails to meet the statutory requirements of Section 309(j) that the Commission promote the rapid deployment of telecommunication services to rural Americans.⁵ Section 309(j)(4)(B) specifically requires the Commission to:

include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure *prompt delivery of service to rural areas*.....⁶

A rule merely allowing licensees to sell parts of their license areas in an auction aftermarket does not rise to the level of an affirmative performance requirement that ensures the prompt delivery of service. In the mandate of Section 309(j)(4)(B), Congress recognized that market forces alone might not guarantee the provision of service to certain areas or certain classes of Americans.

³ CVUS at 8-9. Under the current rules, LMDS licensees need only provide “substantial service” to their service area within 10 years. *Second R&O* at ¶ 266. A licensee offering point-to-multipoint services could provide substantial service by providing coverage to merely 20 percent of the population of its licensed area within 10 years. *Id.* at ¶ 270.

⁴ CVUS at 8-9.

⁵ See 47 U.S.C. § 309(j)(3)(A).

⁶ 47 U.S.C § 309(j)(4)(B) (emphasis added).

Section 309(j) of the Act does not require the Commission to allow licensees to serve rural areas “if they so chose.” Section 309(j) of the Act requires the Commission to ensure that licensees rapidly deliver service to rural areas.

Second, in the absence of meaningful buildout requirements, partitioning is not an effective means of distributing licenses to companies that will provide service to rural areas. As RTG has previously and repeatedly warned the Commission, many licensees are unwilling to partition smaller geographic areas because (1) they find it more burdensome than profitable to negotiate and administer the partitioning deals, and/or (2) they ultimately intend to sell their systems to a larger operator and do not want to carve up the license area.⁷ RTG’s members have found licensees in other services, such as broadband Personal Communications Services (“broadband PCS”) and Multipoint Distribution Services (“MDS”), generally uninterested in consummating partitioning deals. In fact, more than a dozen major wireless companies have reported to RTG a lack of interest in partitioning arrangements and to date only five partitioning deals have been consummated in auction-licensed services as compared to the hundreds of partitioning deals consummated in the cellular service where licensees had only five years to construct.⁸

⁷ See, RTG’s Comments and Reply Comments in response to Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act--Elimination of Market Entry Barriers, *Notice of Proposed Rulemaking*, WT Docket 96-148, GN Docket No. 96-113 (“*PCS Partitioning NPRM*”); see also RTG Comments (filed June 18, 1997), *in re* Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253.

⁸ See 47 C.F.R. § 22.947 (five year exclusive buildout period). The auction-related partitioning deals all involved broadband PCS Major Trading Areas (“MTAs”). No partitioning arrangements have been consummated in Basic Trading Area (“BTA”)-licensed areas. See Pub. Notice, Report No. LB-97-11 (rel. Dec. 20, 1996) (File No. 50050-CW-AL-97)(Cincinnati-

Indeed, CVUS is likely well aware of this short-fall of the marketplace as CVUS's Opposition appears to be carefully crafted around the issue. CVUS argues that if the Commission allows partitioning, then "potential LMDS providers will have the ability to gain access to consumers in previously unserved rural areas,"⁹ and that partitioning will "allow[] entrepreneurial companies to purchase geographic areas from LMDS licensees."¹⁰ CVUS basically argues that if the Commission allows LMDS licensees to sell parts of their licenses, then other companies will be allowed to buy them. CVUS *does not claim* that licensees will actually sell parts of their licenses, that "entrepreneurial companies" *will* actually buy licenses for rural areas, or that any "entrepreneurial company" *will* actually provide service to rural areas. As RTG explained in its Petition, merely allowing partitioning does not mean it will occur.¹¹

In addition, as RTG noted in its Petition, the LMDS in-region eligibility restrictions also substantially reduce the effectiveness of partitioning as a means of deploying LMDS to rural areas.¹² Rural telephone companies are ideally suited to provide new services to their rural service areas through the use of partitioning,¹³ but the LMDS in-region eligibility restriction

Dayton MTA); Pub. Notice, Report No. LB-97-04 (rel. Nov. 1, 1996) (File No. 50003-CW-AL-96) (Spokane-Billings MTA); Pub. Notice, Report No. LB-96-45 (rel. Sept. 6, 1996) (File No. 50030-CW-AL-96) (Minneapolis-St. Paul MTA); Pub. Notice, Report No. LB-96-38 (rel. July 19, 1996) (File No. 50001-CW-AL-96) (Richmond-Norfolk MTA); Pub. Notice, Report No. LB-96-27 (rel. May 10, 1996) (File No. 50002-CW-AL-96) (Spokane-Billings MTA).

⁹ CVUS at 9.

¹⁰ *Id.*

¹¹ See RTG Petition at 6-8.

¹² See RTG Petition at 11.

¹³ See Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5597-9 (1994) ("*Competitive Bidding Fifth R&O*"); Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act--Elimination of

prevents licensees from partitioning to rural telephone companies to serve areas related to their telephone service areas.¹⁴ While rural telephone companies may not be the only entities that could provide service to rural areas with partitioned LMDS licenses, rural telephone companies are in the best position to do so and the most likely to be able to construct and operate a system in a rural area because of existing infrastructure that allows rural telephone companies to take advantage of economies of scale and scope. Accordingly, the eligibility restrictions severely limit the effectiveness of partitioning and ultimately hinder the deployment of LMDS to rural areas.

The Commission's current LMDS performance requirements place no impetus on licensees to either provide service to rural areas or to partition to companies that would provide service to rural areas. What is missing are the meaningful performance requirements required by Section 309(j) of the Act. Accordingly, RTG requests that the Commission reconsider its current LMDS performance requirements and adopt stricter, more meaningful requirements. In order to satisfy the mandate of Section 309(j) of the Act, the Commission should adopt "unserved area" rules for LMDS similar to those adopted for the cellular radio service.¹⁵ Such "use it or lose it" provisions would encourage licensees either to provide service themselves, or to partition licenses to smaller companies who desire to serve less populated areas. Meaningful construction requirements in combination with partitioning *will* ensure the rapid deployment of LMDS to rural areas.

Market Entry Barriers, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket 96-148, GN Docket No. 96-113 (rel. December 20, 1996) ("*PCS Partitioning Order*").

¹⁴ See 47 C.F.R. § 101.1003.

¹⁵ See 47 C.F.R. § 22.949.

There is no merit to CVUS's argument that stricter buildout requirements will discourage the development of multiple, simultaneous niche markets.¹⁶ Contrary to CVUS's view, stricter buildout requirements *will* foster the creation of such niche markets and services. Under the strict buildout proposal which RTG advocates, the Commission would not dictate what services a licensee must provide, but merely that a licensee must provide some service to its license area. This would encourage licensees to seek entrepreneurial companies who could develop innovative niche services. Partitionees could offer many different "specialized or technologically sophisticated services"¹⁷ throughout any given Basic Trading Area ("BTA"). If a particular service "does not require a high level of coverage" as CVUS suggests,¹⁸ then some other service should be offered in the areas devoid of LMDS service. The fact that a service is "specialized or technologically sophisticated" is not a justification for allowing the inefficient use of LMDS spectrum or the warehousing of LMDS spectrum.

CONCLUSION

The Commission's lack of meaningful buildout requirements violates Section 309(j) of the Act by failing to ensure the prompt delivery of LMDS to rural areas. Geographic partitioning alone does not satisfy Section 309(j) and will not ensure the deployment of LMDS to rural Americans. In addition, the in-region eligibility restriction as applied to rural telephone

¹⁶ See CVUS at 9.


¹⁷ *Second R&O* ¶ 270.

¹⁸ CVUS at note 23.

companies further defeats the effectiveness of partitioning as a means of delivering service to rural America. Accordingly, the Commission should reconsider the *Second R&O* and modify it in accordance with RTG's Petition and the arguments contained herein.

Respectfully submitted,

RURAL TELECOMMUNICATIONS GROUP

By: 
Caressa D. Bennet
Gregory W. Whiteaker

Bennet & Bennet, PLLC
1019 Nineteenth Street, NW
Suite 500
Washington, D.C. 20036
(202) 530-9800

Its Attorneys

July 14, 1997

V:\DOCS\LMDS\REPLY7.714

CERTIFICATE OF SERVICE

I, Jacqueline Jenkins, an employee in the law firm of Bennet & Bennet, PLLC, hereby certify that a copy of the foregoing "Reply of the Rural Telecommunications Group to Consolidated Opposition of CellularVision USA, Inc." has been served on the following via first class, U.S. postage pre-paid mail this 14th day of July, 1997:

Chairman Reed Hundt*
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Rachelle Chong*
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Gretchen Rubin*
Office of Chairman Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Rudy Baca*
Office of Commissioner Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Suzanne Toller*
Office of Commissioner Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

David Siddall*
Office of Commissioner Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Dan Phythyon, Acting Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

ITS*
Federal Communications Commission
1919 M Street, N.W., Room 246
Washington, D.C. 20554

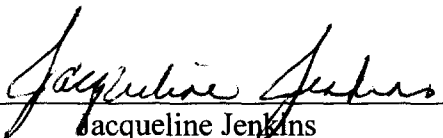
United States Telephone Association
David Cohen
Keith Townsend
1401 H Street, NW, Suite 600
Washington, DC 20005-2164

National Telephone Cooperative Association
David Cosson
L. Marie Guillory
2626 Pennsylvania Avenue, NW
Washington, DC 20037

OPASTCO
Lisa Zaina
Ken Johnson
21 Dupont Circle, Suite 700
Washington, DC 20036

Stephen G. Kraskin
Sylvia Lesse
Kraskin & Lesse
2120 L. Street, NW Suite 520
Washington, DC 20037
Counsel for:
The Independent Alliance

Michael R. Gardner
William J. Gildea III
Harvey Kellman
The Law Offices of
Michael R. Gardner, P.C.
1150 Connecticut, Ave., NW, Suite 710
Washington, DC 20036
Counsel for:
CellularVision USA, Inc.



Jacqueline Jenkins

* via hand delivery

V:\DOCS\LMDs\REPLY7.714